No. 4503

United States Circuit Court of Appeals

For the Ninth Circuit

FRED T. MERRILL,
Plaintiff in Error

vs.

UNITED STATES OF AMERICA,
Defendant in Error

Petition for Rehearing

Upon Writ of Error to the United States District Court for the District of Oregon

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In applying to the court for a re-hearing of this case, we do so, with the hope of persuading a re-consideration of the following points urged by us on the argument of this appeal, which we respectfully submit are deserving of more than the passing mention they received.

I.

Assignment II—Insufficiency of Count Charging Possession. Assignment XVII—Error in Instruction Thereon

The court disposed of these assignments by stating that they had been decided adversely to the plaintiff in error, and cited the case of Nunn vs. U. S. 4 F. (2d) 380, which it is true held that an information charging that defendant had in his possession a quantity of intoxicating liquor, is sufficient.

Assuming that the court has thereby committed itself to a ruling, which is so clearly at variance with the decisions of other jurisdictions (U. S. vs. Illig, 288 Fed. 939), (U. S. vs. Cleveland, 281 Fed. 248), (Hilt vs. U. S. 219 Fed. 421), (U. S. vs. Dowling, 278 Fed. 630), we still contend that we were entitled to an instruction, in line with the clear scope of the 18th Amendment, as sought to be carried into effect by the National Prohibition Act.

In his instructions to the jury, the trial judge said:

> "If you believe Merrill had possession of intoxicating liquor, you should find him guilty." (Trans., p. 163.)

We do not believe that Congress ever suspected that a mere rule of evidence, plainly intended as such, would in time rise to the dignity of a statutory crime.

Section 3 of the National Prohibition Act must necessarily furnish the authority for the creation of this offense, and unless it plainly and unequivocally makes the mere possession of liquor, without exception, an offense, then we submit the court erred in the instruction as given.

Section 3, omitting the portions thereof, that are not material, reads as follows:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, * * * possess any intoxicating liquor except as authorized under this act."

The act recognizes the right of possession and use of intoxicating liquor at certain places and under certain circumstances, and makes such possession illegal only when accompanied by such specific circumstances as would render such possession in violation of law. The trial jury received no such construction of the law, from the instruction as given. The jury was plainly told that if Merrill possessed this liquor, he was guilty; this without the slightest qualification or modification, notwithstanding that the court's attention was specifically directed thereto (Trans. p. 173).

If the instruction as given is the law, then every person who happens, even temporarily, to have in his custody a piece of baggage, a box, a garment or

a parcel in which there may be intoxicants, would be declared guilty, though he may not have intended to use or possess such liquor in violation of law. It would mean that if a passenger boards a crowded train and lifts a suit case from a seat he desires to occupy, then he would be guilty of possession, if that suitcase contains the smallest conceivable quantity of intoxicating liquor, and the fact that such passenger is the most devout religionist or the most active and ardent prohibitionist would not release him from the relentless grasp of the law; it would mean that if a passenger in the act of boarding or alighting from a train delivers his hand bag to a brakeman stationed at the foot of the steps the brakeman becomes a lawbreaker if the hand bag contains intoxicants, and if the brakeman repeats the act a second and a third time he may be sent to the penitentiary; it would mean that if a passenger moves an overcoat belonging to another, from one to another seat or places it in the rack or hangs it on a hook, either with or without the consent of the owner, he commits a crime if in one of the pockets of that overcoat there happens to be a bottle containing intoxicating liquor; it would mean that if the driver of an automobile passes a friend or stranger a-foot and carrying baggage and as an act of kindness invites the footman to ride and assists him to lift his baggage into the automobile, the driver violates the prohibition law if that baggage had concealed in it any quantity of intoxicating liquor.

The case of State vs. Cox, 91 Ore. 518, is squarely in point. The defendant, a hotel porter, was charged with unlawful possession, in violation of a statute similar to the National Prohibition Act. The trial judge gave the same instruction as was given in this case, and the jury felt compelled to convict.

The Supreme Court, speaking through Justice Johns, in holding such instruction to be in error, said:

> "If the mere act of a porter in lifting a suitcase which contained intoxicating liquors is within itself a violation of the statute in question, then any minister, old lady or the most radical prohibitionist, through chance or design might be made the innocent victim of having intoxicating liquor in his or her possession, and under the instructions given by the trial court in this case could be convicted of that offense. We do not believe that the statute should be so construed, and prefer to adopt the 'rule of reason'."

We hope, that inasmuch as the opinion makes no specific mention of this assignment, that the court will feel disposed to grant a rehearing, so that this matter may be more fully argued.

II.

Assignment VII—Error in Admitting Record of Conviction of Misdemeanor

The court, at the time of the argument, was ap-

parently impressed with the merit of this assignment, yet in its opinion the court states as follows:

> "There is a conflict of authority upon this question in the different circuits, but the great weight of modern authority seems to sustain the ruling of the court below."

The court cited the following cases, all of which have been examined, and we respectfully submit that most of them are not only not in point, but that the remaining cases can be readily distinguished.

1. Fields vs. U. S. 221 Fed. 243 (Fourth Circuit).

In that case the defendant on trial for a felony was cross-examined as to a conviction of a similar offense. (This case is not in point, as the prior conviction of a *felony* is involved.)

2. Christopule vs. U. S., 230 Fed. 788 (Fourth Circuit).

In that case the defendant was asked on cross-examination, if he ran a "blind tiger," which implied that he sold liquor unlawfully. (This may or may not have been a felony under the laws of the State of South Carolina, wherein the trial was held, but in any event it was for a *similar offense.*)

3. Gordon vs. U. S., 254 Fed. 53 (Fifth Circuit).

In that case, the defendant was charged with operating a still, and upon cross-examination, he

was asked if he had not been convicted for the same offense two years before. (This referred to a prior conviction of a *felony.*) In his opinion the court specifically said:

> "He may be impeached like any other witness, by proving that he has been *convicted of a felony;* the punishment provided in the statute, for the offense of which the plaintiff had previously been convicted, made it a felony."

4. MacKnight vs. U. S., 263 Fed. 832 (First Circuit).

In that case, the defendant was asked, on cross-examination, if he had not been convicted of forgery and sentenced to the penitentiary. (This referred to a prior conviction of *felony.*)

5. Tierney vs. U. S., 280 Fed. 323 (Fourth Circuit).

In that case, the defendant was indicted for carrying on the business of a retail liquor dealer, and he was asked concerning a prior conviction of a similar offense. (This related to a prior conviction for a *felony,* and a *similar offense.*)

6. Krashowitz vs. U. S., 282 Fed. 599 (Fourth Circuit).

The defendant was indicted for violating the liquor laws, and the court held that he may be asked

on cross-examination if he had not been guilty of other *like offenses.*

7. Murray vs. U. S., 288 Fed. 1008 (D. C.).

This was an appeal from the Supreme Court of the District of Columbia, and in that case the defendant was asked on cross-examination, if he had not been convicted of a certain misdemeanor, but the court held that this was only admissible by reason of section 1067 of the District Code, which provided that the conviction of a crime might be given in evidence to effect his credit as a witness, and that the word 'crime' used in that section, included both felony and misdemeanor. (*In this case we have no Federal or State Statute governing the proceedure, but are controlled by a common law.*)

8. Nutter vs. U. S., 289 Fed. 484 (Fourth Circuit).

In that case, the defendant was charged with the crime of selling morphine, and he was asked if he had not been previously convicted of this crime. (This plainly related to a *prior conviction of a felony,* as well as a *similar offense.*)

9. Wheeler vs. U. S., 293 Fed. 588 (Fifth Circuit).

In that case the court held that a defendant may be asked, on cross-examination, if he had not previously been convicted of a *felony.*

10. Jones vs. U. S., 296 Fed. 632 (Fourth Circuit).

The defendant was convicted of a violation of the prohibition act, and the court held that there was no error in permitting cross-examination of the defendant, as to *other similar offenses.*

11. Parks vs. U. S., 297 Fed. 834 (Fourth Circuit).

The defendants were convicted for violation of the National Prohibition Act, and the court held that the cross-examination of Parks, as to a former conviction, was competent. (The opinion does not state the nature of the conviction, whether it was for a felony, similar offense, or a misdemeanor.)

12. Neal vs. U. S., 1 F. (2nd Ed.) 637 (Eighth Circuit).

This case originated in the Western District of Oklahoma. The defendant was convicted of selling liquor to an Indian. A witness for the defendant was asked on cross-examination, if he had not been convicted of a violation of a municipal ordinance. The court held that the rules of evidence governing Federal courts in criminal cases arising in that district (Western District of Oklahoma) are those which were enforcible in Oklahoma Territory at the time of the admission of Oklahoma as a State; that when no Oklahoma decision can be found on the

question, it may be generally held that the violation of a municipal ordinance is not a crime, and a conviction therefor can not be shown. The court there cited with approval, the case of Glover vs. U. S., 147 Fed. 426:

> "The general rule is, that the crime must rise to the dignity of a petit larceny."

The court therefore reversed the conviction on the grounds that the admission of this evidence was prejudicial error. The court further held:

> "The cases, holding it permissible to show former conviction of a witness of the violation of the National Prohibition Act, are not in point, for the reason that a violation *of that act* is a crime."

13. Liddy vs. U. S., 2 F. (2nd) 60, (U. S. District Court of Pa.).

In that case, the district judge merely held that a defendant charged with the illegal sale of liquor, who as a witness in his own behalf, testified that he had never previously sold liquor unlawfully, opened the door for cross-examination as to *whether he had previously been convicted of such offense.*

14. Williams vs. U. S., 3 F. (2nd) 129 (Eighth Circuit).

In that case, the court held that a witness may

be asked on cross-examination, whether he had been convicted of a *felony.*

It will therefore be seen that practically all of the cases cited in support of the court's decision are cases where the prior conviction elicited was either that of a felony or a similar offense, neither of which is applicable here.

Furthermore, we find that a number of the earlier cases cited from the Fourth District were distinguished in the recent case of *Newman vs. U. S.* 289 *Fed.* 712 (4th Circuit). In the case last mentioned, the defendant was on trial for illegal sale of narcotics. On cross-examination, the defendant was asked if he did specialize in abortions and engage in thefts. On his denial, testimony thereof was permitted to be given. It was held that permitting such cross-examination and the introduction of such testimony, although part of it was afterwards stricken out, was prejudicial and reversible error. The court quoted with approval the case of *Bullard vs. U. S.* 245 *Fed.* 837, where the accused was convicted for illicit distilling. On cross-examination he was asked if he had not been found guilty of assault. He answered by saying that the case was quashed. The government then offered the judgment roll to show that the case had not been quashed, and over objection the same was admitted in evidence. The court in reversing the judgment said:

> "We are not aware of any theory upon which this ruling can be defended. The subject matter of the question addressed to the defendant was obviously collateral to the issue on trial, and the government was bound by his answer. Indeed, it is elementary that the contradiction in such a case is not permissible. The district attorney in pursuing the inquiry wholly unrelated to the charge under investigation took the risk of replies which would defeat the effect to show that the witness was a man of bad character or otherwise unworthy of belief. The prejudicial effect of this evidence can scarcely be doubted. That the admission of this evidence was reversible error seems to us an unavoidable conclusion."

Our case is clearly in point. The defendant denied that he had been previously convicted, and in line with the last quoted authority, the government was bound by his answer, inasmuch as such prior conviction was not only extremely remote but constituted an entirely separate and distinct offense, in no wise related to the issue on trial. Over our objection, the prosecution was permitted to introduce the judgment roll.

Moreover, we were of the opinion that the cases submitted in our brief, and argued before the court, were sufficiently persuasive and controlling. In particular the case of *Solomon vs. U. S.,* 297 *Fed.* 82, supported by numerous precedents and logical reasoning, discusses the subject so exhaustively and

thoroughly as to permit no other conclusion but that the trial court erred in admitting this testimony. We are frank to confess our keen disappointment that the opinion utterly ignored our authorities, without even attempting to discuss or distinguish same, and we earnestly petition the court to reconsider this assignment, to the end that a frank discussion may be had of the cases submitted by us in support of our contention.

III.

Assignments 10-11—Error in Restricting Cross-Examination

The opinion disposes of these assignments, by merely citing the case of West vs. U. S., 2 F. (2d) 201, and adopting the phrase "These exceptions hardly deserve mention."

We cannot help but express our deep mortification that the time and effort expended by us in developing these assignments should receive so little consideration. Frankly, we considered them of the utmost importance, and we hope that the court will see its way clear to point out to us wherein the cross-examination of the government's witnesses was immaterial.

So far as the case of West vs. U. S. supra, is concerned, it hardly furnishes a fair criterion. In that case the government witness was asked to give a list of the various persons he had met at other

places. (This we did not do.) The waiter was asked what were his general duties. (This we did not rely upon.) Some cross-examination was permitted of the woman as to what she did at the other place. (We were not even allowed that latitude.)

Without intending to repeat what has already been fully said in pages 34 to 54 of our brief, we contend we are justified in our claim that we were unduly restricted in our cross-examination of government's witnesses, particularly when it was within the scope of our defense theory that the liquor introduced on defendant's premises was liquor that the witnesses themselves had introduced, just exactly as was done by them on a previous occasion, *pursuant to their general instructions for investigating all roadhouses.*

Inasmuch as the opinion does not discuss this evidence, or its materiality on account of the nature of our defense, nor does it discuss the cases cited, we are prevented from knowing just wherein the cross-examination sought to be pursued was immaterial, or so trivial, as indicated by the opinion. Surely the time taken for the trial of this case should not be taken into consideration, when the court is not apprised of the time taken by the government in the presentation of its case in chief, nor how much of the time was devoted to the selection of a jury and arguments of counsel! It must be borne in mind that the defendant, at the age of 66, faces a jail sentence!

May we ask the court to kindly re-consider these assignments and to peruse again our brief upon these points, and we cannot help but feel confident that a careful analysis of the record, the nature of the cross-examination, its purpose and object, and its applicability to the theory of our defense, will demonstrate its materiality, at least sufficiently so to merit a discussion of same.

IV.

Assignment 48—Error in Failing to Instruct Upon Our Theory of Defense

As pointed out in our argument and brief, the trial court gave an instruction upon the government's theory of the case, but refused to give an instruction requested by us upon our theory of defense.

We assumed that there could be no question concerning the merits of this point, and that the case of Calderon vs. U. S., 279 Fed. 556, cited in the brief, would be controlling of the question.

The opinion makes no mention of this assignment, and gives no reason for its rejection, other than the general statement "that an examination of the record satisfies us that the case was clearly and fairly submitted to the jury."

We respectfully submit that in view of our authority supporting our position on this question,

that we are justified in the belief that it was worthy of consideration and discussion.

CONCLUSION

It is with regret that we are compelled in obedience to our obligations to our client, to differ in so many respects with the opinion of the court, but we find consolation in the thought that perhaps the pressure of business and the great increase in the number of appeals in prohibition cases, have made it practically an impossibility to give a more studied and exhaustive examination of the record, such as we naturally would like to receive. We feel therefore that the court will be the more readily disposed to grant a rehearing if, upon a re-examination of the points herein mentioned, there will be indicated a grave doubt of the correctness or sufficiency of the opinion.

Respectfully submitted,

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Attorney for Plaintiff in Error.

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the aforegoing petition is well founded, and that it is not interposed for delay.

BARNETT H. GOLDSTEIN,

Attorney for Plaintiff in Error.